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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

ALBERT THOMPSON,
Petitioner,

v.

KAWASAKI KISEN, K.K., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Albert Thompson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on July 7, 1965.

Opinion Below.

No opinion was rendered in the District Court. The opinion of the United States Court of Appeals for the First Circuit is printed in the appendix hereto (pp. 8-11) and also annexed to the record of the Court below (R. 57).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Did the Court of Appeals err in upholding the District Court in its ruling that plaintiff, a longshoreman, was required to testify as to his receipt of benefits ranging from $70 to $52 weekly during the period of his disability?

2. Did the Court of Appeals err in holding that a longshoreman's claim for injuries from a ship's accident is controlled by Massachusetts state law respecting the introduction of evidence as to the receipt of weekly benefits rather than federal law applicable to a maritime tort?

Statement.

At the time of his accident on September 3, 1961, the petitioner was fifty-four years old. He had engaged in longshore work steadily for thirty-two years. Despite the varied jobs of a longshoreman, ninety per cent of his work had been that of a holder. The work of a holder is heavy work requiring the lifting and moving of cargo.

While carrying a carton of nails, the plaintiff tripped and fell over a piece of dunnage. Prior to the accident plaintiff was in good health. Thereafter he was treated for his back injury at the Traveler's Clinic. At one time he was an inpatient at the Massachusetts General Hospital for about six weeks. From the onset of his disability to the trial on October 13, 1964, a period of over three years, the plaintiff was able to earn about $400. He was unable to resume work as a holder or do any heavy work in any other capacity. He was unable to procure work as a hatchtender. Prior to his injury plaintiff averaged a yearly income of $8,000 per year. The elements of damages sustained by the plaintiff consisted of (1) a loss of earnings alone of about $24,000; (2) agreed-to medical and hospital bills amounting to $1,445; (3) future loss of earnings be-

cause of plaintiff's permanent disability; and (4) pain and suffering endured and to be endured.

In the course of petitioner's cross-examination the following colloquy between the witness, counsel and the Court took place.

"Q. During this period you were receiving, from a source which for the moment I won't reveal, $70 a week, weren't you?

"MR. GREENBERG: I object to that, your Honor. That is strictly out of order and he knows it.

"THE COURT: Read the question.

(Question read)

"THE COURT: During what period?

"MR. HALLISEY: From the time of the accident—I guess I didn't define the period very closely, Judge, but it was from the time of the accident up until August of 1962, I think.

"THE COURT: It may be put.

"MR. GREENBERG: Your Honor, there's two Supreme Court decisions on that. That it is not admissible. Will you note my objection, please?

"THE COURT: Yes.

"MR. GREENBERG: I can give you the names of the cases if you want them. Within the last year.

"THE COURT: Put the question.

"MR. GREENBERG: Note my objection.

"MR. HALLISEY: Will you read it again, please?

(Question read)

"THE COURT: Yes or no.

"MR. GREENBERG: Do you have my objection?

"THE COURT: Yes.

"A. What year is that, please?

"Q. That was from the time of the accident up until August of 1962.

"A. Well, I received $70 a week for a period of time. I don't remember what period of time.

"Q. And then it was reduced to about $52 a week?

"MR. GREENBERG: Note my objection to this, too.

"THE COURT: I will. Go ahead.

"A. Yes, sir.

"Q. And that is continuing right until today, isn't it?

"A. No. I haven't been getting it recently." (R. 31, 32, 33.)

The jury returned a verdict in the sum of $7,827 on the negligence cause of action and found for the defendant on the unseaworthiness claim. The third-party defendant, Bay State Stevedoring Company, had previously filed a notice and claim of lien in the sum of $9,761.17, which constituted a total of compensation and medical benefits given to the plaintiff. The District Court entered a judgment and order that, by reason of the fact that the lien exceeded the jury verdict, the plaintiff was not entitled to any recovery of money whatsoever.

Reasons for Granting the Writ.

The decision of the Court of Appeals is in direct conflict with the decision of the Supreme Court in *Eichel* v. *New York Central Railroad Co.*, 375 U.S. 253. In addition, there appears to be a conflict of opinion between the decision of the First Circuit in the present case and the decision of the Fifth Circuit in the case of *A. H. Bull Steamship Co., Inc.*, v. *Ligon*, 285 F. 2d 936 (5 Cir. 1960).

Respondent Kawasaki Kisen, K.K., on cross-examination propounded this question to petitioner:

"Q. During this period you were receiving from a source which for the moment I won't reveal $70 a week, weren't you?"

Petitioner duly objected, but the District Court overruled the objection and the jury heard the plaintiff testify he received $70 a week for a period and later $52 a week. Respondent, in employing the phraseology "from a source which for the moment I won't reveal," sought to avoid the impact of this Court's ruling on the same issue in the *Eichel* case. Respondent did not spell out that petitioner received these benefits from the Federal Act applicable to longshoremen, namely the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* No reason for the offering of this testimony was given by the respondent.

The *Eichel* case, *supra,* is squarely in point. In *Eichel,* the defendant offered evidence that the plaintiff received $190 monthly benefit under the Railroad Retirement Act. The evidence was offered for the purpose of showing that the plaintiff had an inducement to prolong his disability and not return to work. The Supreme Court rejected the use of this type of evidence and wrote at page 255:

"We disagree. *In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.* Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U. S. C. § 228b (a) 4, were considered as evidence of malingering by an employee asserting a claim under

> the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U. S. 34. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments." (Emphasis added.)

The First Circuit distinguishes *Eichel* from the present case on the basis that *Eichel* was an action under the Federal Employers' Liability Act while petitioner's action was not predicated on any federal statute but is simply an ordinary negligence action governed by state law. This Court has always deemed a longshoreman's action for recovery based on a ship accident as a maritime tort ruled by federal law. In *Pope & Talbot, Inc.*, v. *Hawn*, 346 U.S. 406, the harsh state common-law doctrine of contributory negligence as a complete bar was eliminated and the liberal maritime tort doctrine of comparative negligence was applied to a longshoreman's claim. And in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), the seamen's remedy to recover for unseaworthiness exclusive of their existing right to recover for negligence was extended to longshoremen.

As stated by the Fourth Circuit in *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113, 124 (1964):

> "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by

independent contractors who may be called upon to work aboard vessels."

The reasoning of the *Eichel* case that the likelihood of misuse by the jury outweighs the value of this evidence would seem to be established in the instant case. The jury certainly must have inferred that the $70 and $52 weekly benefits were paid to the plaintiff under a compensation statute. The jury did not know that all the compensation benefits had to be repaid to the insurer of Bay State Stevedoring Company as a priority lien before the plaintiff received any money from their jury award. The jury probably figured he already has collected these weekly benefits and reduced their ultimate award accordingly. The verdict of $7,827, in view of the extensive elements of damages spelled out above, would confirm this view. In any event, the *Eichel* case (*supra*) requires a finding that the District Court committed error in receiving this prejudicial evidence.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Boston, Massachusetts,
Attorney for Petitioner.

NATHAN GREENBERG,
Of Counsel.

[Appendix follows.]

Appendix.

United States Court of Appeals for the First Circuit.

No. 6447.

ALBERT THOMPSON,
PLAINTIFF, APPELLANT,
v.
KAWASAKI KISEN, K.K., et al.,
APPELLEES;

No. 6457.

BAY STATE STEVEDORING COMPANY,
THIRD-PARTY DEFENDANT, APPELLANT,
v.
ALBERT THOMPSON et al.,
APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, BREITENSTEIN,*
Circuit Judge, and GIGNOUX, *District Judge*.

* By designation.

Nathan Greenberg for Albert Thompson.

Blair L. Perry, with whom *Hale and Dorr* was on brief, for Bay State Stevedoring Company.

Hiller B. Zobel, with whom *Robert J. Hallisey*, *Thomas H. Walsh*, and *Bingham, Dana & Gould* were on brief, for Kawasaki Kisen, K.K.

OPINION OF THE COURT.

July 7, 1965.

BREITENSTEIN, *Circuit Judge.* The sole issue in this negligence action is whether at the jury trial the court properly received evidence of payments to the plaintiff (appellant Thompson) from an unnamed source during a period for which he claimed disability.

Plaintiff, an injured longshoreman, sought recovery from a shipowner (appellee Kawasaki Kisen, K.K.) which in turn sought indemnity from the stevedoring company (Bay State), the plaintiff's employer. The case was begun in a Massachusetts state court and removed to federal court by the shipowner on the ground of diversity. The shipowner filed a third-party complaint against the stevedoring company. The jury found for the shipowner on the claim of unseaworthiness and for the longshoreman on the claim of negligence. The third-party complaint issues were heard by the court without a jury and the stevedoring company was ordered to indemnify the shipowner. The verdict of $7,827 was for less than the payments made to the longshoreman by his employer's compensation carrier and the court upheld the carrier's lien.

The longshoreman is dissatisfied with the recovery and his appeal (No. 6447) is based on the alleged erroneous admission of the noted evidence. The stevedoring company's appeal (No. 6457) is directed to the preservation of its third-party defendant's rights with respect to the scope of any new trial which may be ordered.

The accident occurred when the longshoreman was working in the hold of the ship unloading cargo. He stumbled on a piece of dunnage while carrying a carton of nails. He claimed an injury to his back, was hospitalized, and asserts inability to work. On cross-examination of the

plaintiff, counsel for the shipowner asked the following question:

> "Q. During this period you were receiving from a source which for the moment I won't reveal $70 a week, weren't you?"[1]

An objection, which we deem appropriate to raise the issue here presented, was overruled. The answer disclosed that plaintiff had received $70 a week for an undefined period and later $52 a week, but at the time was receiving nothing.

Counsel for the longshoreman argues that the trial court erred in requiring an answer to the question on receipt of benefits during the disability period. He relies on *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U.S. 34, rehearing denied 375 U.S. 936, and *Eichel* v. *New York Cent. R.R.*, 375 U.S. 253. *Tipton* is not pertinent. There the Supreme Court held that evidence of the receipt of compensation under the Longshoreman's and Harbor Workers' Compensation Act[2] was not admissible on the issue of whether the plaintiff was an offshore drilling employee rather than a seaman because that status was to be determined on the basis of the facts of the case—not on the basis of a prior contention of the plaintiff.

Eichel was an action under the Federal Employers' Liability Act[3] and the Supreme Court held that evidence of the plaintiff's receipt of a disability pension under the

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[1] Although the source of the payments was not identified, the plaintiff and his counsel, both before and after the question in issue, improperly (*cf. Eichel* v. *New York Cent. R.R.*, 375 U.S. 253, 255) brought to the attention of the jury the presence of insurance in connection with the care and treatment which the plaintiff had received.

[2] 33 U.S.C. § 901 et seq.

[3] 45 U.S.C. § 51.

Railroad Retirement Act of 1937 [4] was properly excluded. The Court commented that "it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act * * * were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act."

The instant case is not based on any federal statute but rather on ordinary negligence. No authority of which we are aware holds that the rules of evidence applicable to ordinary negligence cases do not apply when the plaintiff is a longshoreman and the defendant is a shipowner. Rule 43(a), F.R.Civ.P., provides that evidence shall be admitted if it is admissible under the rules of evidence applied in either the federal courts or the courts of the state in which the federal court is held [5] and that the rule which favors the reception of the evidence governs.[6] The case at bar was begun in Massachusetts and removed to federal court because of diversity. Under Massachusetts law evidence of receipt of collateral income is admissible "to affect the weight of plaintiff's previous testimony that he was disabled from working on account of the accident." [7] The trial court properly permitted the question to be answered.

In No. 6447 the judgment is affirmed. This action makes unnecessary the consideration of No. 6457 and that appeal is dismissed.

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[4] 45 U.S.C. § 228b(a)4.

[5] See *J. H. Horne & Sons Co.* v. *Bath Fibre Co.*, 1 Cir., 272 F.2d 8, 10.

[6] See 5 Moore, Federal Practice, ¶ 43.04, at 1326-1328 (2d ed.).

[7] *McElwain* v. *Capotosto*, 332 Mass. 1, 122 N.E.2d 901, 902.